

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**LINDA J. HUMPRHEY, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Detroit, MI, Employer**

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**Docket No. 05-136  
Issued: April 18, 2005**

*Appearances:*

*Paul H. Kullen, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman

DAVID S. GERSON, Alternate Member

MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On October 13, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated July 27, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's July 30, 2003 decision denying appellant's claim. Because more than one year has elapsed between the last merit decision and the filing of this appeal on October 13, 2004 the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On January 11, 1983 appellant, then a 33-year-old postal clerk, filed an occupational disease claim alleging that she sustained a pulmonary condition due to the dusty conditions of her workplace. The Office accepted that she sustained temporary aggravation of sarcoidosis and precipitation of left pneumothorax. The Office determined that the medical evidence showed that appellant had disability due to this condition from August 7 to October 2, 1982 and she received appropriate disability compensation. The Office relied on a March 18, 1985 report of Dr. Paul A. Kvale, a Board-certified internist specializing in pulmonary medicine, who served as an Office referral physician.

Appellant later claimed that she had employment-related disability after October 2, 1982 and submitted an April 12, 1990 report of Dr. Howard S. Goldberg, an attending Board-certified internist specializing in pulmonary medicine. By decision dated November 22, 1993, the Office denied appellant's claim on the grounds that the medical evidence did not establish that she had employment-related disability after October 2, 1982. By decision dated October 17, 1995, the Board set aside the Office's November 22, 1993 decision and remanded the case to the Office for further medical development. The Board determined that there was a conflict in the medical evidence regarding whether she had employment-related disability after October 2, 1982 and found that she should be referred to an impartial medical specialist to resolve the conflict.<sup>2</sup>

In April 2000 appellant was referred to Dr. William D. Hanna, a Board-certified internist specializing in pulmonary medicine, for an impartial medical examination and opinion regarding whether she had employment-related disability after October 2, 1982.<sup>3</sup> By decision dated September 26, 2000, the Office determined that the weight of the medical evidence, as represented by the May 16 and July 31, 2000 reports of Dr. Hanna, showed that appellant had no employment-related disability after October 2, 1982. By decisions dated May 22, 2001 and July 25, 2002, the Office affirmed its September 26, 2000 decision.

By letter dated July 21, 2003, appellant requested reconsideration of her claim. She submitted a July 15, 2003 report in which Dr. Jerome Wilburn, an attending physician specializing in pulmonary medicine, suggested that her sarcoidosis had been permanently worsened by her employment-related pneumothorax condition. By decision dated July 30, 2003, the Office affirmed its prior decisions. The Office determined that the July 15, 2003 report of Dr. Wilburn was of limited probative value on the issue of whether appellant had employment-related disability after October 2, 1982. It noted that Dr. Wilburn did not base his opinion on a

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<sup>2</sup> Docket No. 94-868 (issued October 17, 1995). Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>3</sup> Appellant had been referred to several impartial medical specialists, but the reports of these specialists were not deemed sufficient to constitute the weight of the medical evidence.

complete and accurate factual history and that he did not adequately explain why he felt that appellant's employment-related pneumothorax condition was permanent in nature.<sup>4</sup>

By letter dated June 17, 2004, appellant requested reconsideration of her claim. She submitted a curriculum vitae of Dr. Wilburn and a brief "physician's statement" from February 1984 which contained the address of Dr. Donovan H. Givens, an attending physician specializing in internal medicine.<sup>5</sup> Appellant suggested that the curriculum vitae satisfied the Office's concerns about the probative value of the July 15, 2003 report of Dr. Wilburn.

By decision dated July 27, 2004, the Office denied appellant's request for further merit review of her claim.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>6</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.<sup>8</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>9</sup>

### **ANALYSIS**

The Office accepted that appellant sustained an employment-related temporary aggravation of sarcoidosis and precipitation of left pneumothorax and found that the medical evidence showed that she had disability due to this condition from August 7 to October 2, 1982. In several decisions, the Office found that appellant did not meet her burden of proof to show that she had employment-related disability after October 2, 1982.

In support of her June 17, 2004 reconsideration request, appellant submitted a curriculum vitae of Dr. Jerome Wilburn, an attending physician specializing in pulmonary medicine. She

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<sup>4</sup> The Office also noted that the July 15, 2003 report of Dr. Wilburn carried no letterhead and did not identify his medical specialty.

<sup>5</sup> The February 1984 report is unsigned and it remains unclear whether it was completed by Dr. Givens.

<sup>6</sup> 5 U.S.C. § 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. §§ 10.606(b)(2).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> 20 C.F.R. § 10.608(b).

had previously submitted a July 15, 2003 report of his and, in its July 30, 2003 merit decision, the Office had determined that this report did not contain sufficient probative value to establish her claim that she had employment-related disability after October 2, 1982. Therefore, appellant's submission of nonmedical evidence, such as a curriculum vitae, would not be relevant to the main issue of the present case, *i.e.*, whether she submitted sufficient medical evidence to establish that she sustained employment-related disability after October 2, 1982. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup>

Appellant also submitted a brief "physician's statement" from February 1984 which contained the address of Dr. Givens, an attending physician specializing in internal medicine. However, she had previously submitted this document and it had already been considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>11</sup>

In the present case, appellant has not established that the Office improperly denied her request for further review of the merits of its July 30, 2003 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>10</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979). Although the Office noted in its July 20, 2003 decision, that the July 15, 2003 report of Dr. Wilburn was not printed on his letterhead, it considered the document to be a medical report and fully evaluated its probative value on the relevant issue of the present case. Appellant suggested that the submission of Dr. Wilburn's curriculum vitae satisfied the Office's concerns about the probative value of his July 15, 2003 report, but she did not adequately articulate the basis for this argument. The Board has found that the reopening of a claim is not required where a new legal contention does not have a reasonable color of validity. *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>11</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' July 27, 2004 decision is affirmed.

Issued: April 18, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member